IN THE

Supreme Court of the United States

October Term, 1957

Nos. 483, 484

LAWRENCE SPEISER, *Appellant*, vs. JUSTIN A. RANDALL, as Assessor of Contra Costa County, State of California, *Appellee.*	No. 483
DANIEL PRINCE, *Appellant*, vs. CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, *Appellee.*	No. 484

BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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Interest of the Amicus

The American Jewish Congress, a national organization founded in 1918, is a voluntary association of American Jews committed by its constitution to the dual and, for us, inseparable purposes of defending and extending American democracy and preserving our Jewish heritage and its values. The American Jewish Congress has therefore always

been unequivocally opposed to Communism, fascism and all other forms of totalitarianism. We know full well the meaning and nature of Communist tyranny and of its debasing and dehumanizing effects upon all who have been forced to live under its dictates.

We are nevertheless convinced that the threat of totalitarianism cannot be effectively met by adopting the methods of totalitarianism or otherwise compromising our basic freedoms. We are committed to the proposition that the surest way to preserve our nation and our democracy is to guard jealously the liberties secured by our Constitution and Bill of Rights and to oppose any infringements upon those liberties not clearly necessitated by overriding emergencies. Believing that the statute involved in this appeal constitutes an infringement upon American liberties that cannot be justified as clearly necessitated by an overriding emergency, we have sought and obtained the consent of the parties to the submission of this brief *amicus curiae*.

Statement of the Case

These two cases arise on appeal from a judgment of the Supreme Court of California sustaining the constitutionality of a State constitutional provision barring the grant of tax exemption to persons advocating the overthrow of government and an effectuating statute imposing subscription to a "nonsubversive" oath as a requirement for enjoying tax exemption. The appellants are veterans of World War II and would thus be entitled to certain tax exemption benefits under California law. They were denied these benefits because of their refusal to subscribe to the oath. Except for the fact that the petitioner in *First*

Unitarian Church v. *County of Los Angeles*, October 1957 Term Number 382, is a religious organization accorded tax exemption under a different statute, the facts in these cases are substantially the same as those in the latter case and the opinion of the Supreme Court of California in that case (reported unofficially in 311 P. 2d 508) covers these cases as well.

Statutes Involved

These cases involve the constitutionality of the following provisions of the California constitution and statutes:

California Constitution, Article XX, Section 19(b):

> "Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:
>
> • • •
>
> "(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.
>
> "The Legislature shall enact such laws as may be necessary to enforce the provisions of this section."

Revenue & Taxation Code of California, Section 32 (Stats. 1953, c. 1503):

> "Any statement, return or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district,

political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such a declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution."

The Issue to Which This Brief is Addressed

This brief is addressed to the question whether a government can constitutionally deprive a person of a benefit, accorded to others of the same class, because of his engaging in advocacy of the overthrow of the government by force, violence or other unlawful means, without any showing that such advocacy has the quality of incitement to concrete action.

Summary of Argument

The Constitution recognizes only two classes of expression: that which is permissible and that which may be prohibited. The Constitution does not recognize or sanction a third class of expression which, while it may not be prohibited, may nevertheless be discouraged by withholding from those who engage in it benefits granted to others in the same class.

Under the decisions of this Court culminating in *Yates* v. *United States*, 354 U. S. 298, it cannot constitutionally be made criminal to "advocate the overthrow of the Government of the United States by force or violence or other unlawful means," where such advocacy has no quality of incitement to concrete action. Since the statute herein does not distinguish between advocacy as an abstract doctrine and advocacy that incites to concrete action, it is unconstitutional.

Argument

I. Expression that may not constitutionally be prohibited may not be discouraged through the withholding of benefits granted to others in the same class.

A. Government May Not Purchase Silence.

We submit that where expression on a matter of public interest is involved, neither a State nor the Federal government can constitutionally buy silence. The State may not determine that specific forms of expression, while constitutionally protected, shall be discouraged by calculated manipulation of state-conferred benefits. To do so, the

state must first "prescribe what shall be orthodox," a step that is condemned by the whole tenor of the Constitution. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642. Hence, it is not surprising that any measure that violates this concept is open to attack on a number of independent constitutional grounds.

Thus, the term "abridging the freedom of speech" in the First Amendment (made applicable to the states by the Fourteenth) includes not merely criminal penalization but also the deprivation of benefits that would otherwise be accorded. Or, at least in respect to the states, withholding of a benefit accorded to others in the same class may be adjudged a denial of equal protection of the laws, and hence a violation of the "mandates of equality and liberty that bind officials everywhere." *Nixon* v. *Condon*, 286 U. S. 73, 88. Or, in respect to both the Federal and State Governments, such withholding may be deemed violative of the substantive implications of the due process clauses of the Fifth and Fourteenth Amendments. (*Cf. Farrington* v. *Tokushige*, 273 U. S. 284, where this Court invalidated as violative of the Fifth Amendment a Hawaii statute which imposed excessive regulations upon foreign language schools for the purpose of discouraging their operation and attendance thereat.) Or the substantive aspects of due process can be used to achieve the same end in a somewhat different way; i.e., that use of tax-raised funds to purchase silence on issues of public importance constitutes the use of taxation for a non-public purpose (*cf. Loan Association* v. *Topeka*, 20 Wall. 655; *Cochran* v. *Louisiana State Board*, 281 U. S. 370) since, as we urge below, no public purpose is served by discouraging such expression. Finally, in respect at least to expression regarding matters affecting the Federal government (in-

volved herein since the California statutes include advocacy of the overthrow of the Federal government), such a withholding might be deemed an impairment of the "privileges and immunities" clause. (*Cf. Hague* v. *C. I. O.*, 307 U. S. 496, where it was held that freedom to use municipal streets and parks to discuss Federal issues was protected by the "privileges and immunities" clause.)

Any of these provisions, we suggest, may be used to reach the basic principle we urge, that the instrumentalities and benefits of government may not be used to discourage expression which the First Amendment protects from penalization. We concede that we have been unable to find any decision of this Court which specifically asserts this principle. We submit, nevertheless, that it is implicit in a number of decisions of the Court.

In *Fowler* v. *Rhode Island*, 345 U. S. 67, it was held that a State could not bar the use of parks for the delivery of sermons of an "unorthodox" nature by an unpopular religious group while permitting its use for the delivery of orthodox sermons by accepted religious groups. (See also *Kunz* v. *New York*, 340 U. S. 290.) It is true that the *Fowler* case involved freedom of religion rather than freedom of speech or press, but this Court has held that "The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins*, 323 U. S. 516, 531. See also *Hague* v. *C. I. O., supra.*

Perhaps closer in point is *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, wherein it was held that the Postmaster General could not deny to a publisher the benefits of low-cost second class mailing privileges merely because the former was of the opinion that the matter sought to be mailed did not contribute to the public good and the public

welfare. It is true, of course, that the decision was based upon statutory interpretation rather than constitutional law, but the Court's opinion states that "grave constitutional questions are immediately raised" if it be urged that "the second-class rate could be granted on condition that certain economic or political ideas not be disseminated." 327 U. S. at 156.

In *West Virginia State Board of Education* v. *Barnette, supra,* it was held that a State could not constitutionally condition the benefit of a free public school education upon the pupil's saluting the flag and reciting the Pledge of Allegiance. The constitutional considerations that preclude a State from purchasing a particular form of expression would seem equally to preclude it from purchasing a particular form of silence. Moreover, it is significant that the opinion in the *Barnette* case is couched exclusively in language of compulsion and coercion,[1] even though the only consequence under West Virginia law was forfeiture of the benefit of a free public school education. This, we suggest, is an implicit recognition that in the area of First Amendment expression there is no constitutional distinction between abridgment by application of the penal laws and discouragement through the withholding of benefits accorded to compliant members of the same class.

This concept finds clear support in a number of cases holding that rights secured by the First Amendment may not be subjected to any substantial tax. *Murdock* v. *Pennsylvania,* 319 U. S. 105 (religious expression); *Jones* v. *Opelika,* 319 U. S. 103 (adopting dissenting opinion in 316

[1] *E.g.* "* * * no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U. S. at 642.

U. S. 584) (religious expression); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (general newspaper). The unconstitutionality, for example, of a statute that imposed a substantial tax upon persons delivering sermons or making political speeches is hardly open to question. Even more certain it is that a discriminatory tax upon expression within the purview of the First Amendment is unconstitutional. A tax upon religious periodicals but not non-religious ones, or upon newspapers expressing political views but not upon those outside the political arena could hardly be sustained. Most certain of all is the unconstitutionality of a law taxing newspapers whose editorial viewpoint favors the Republican Party while imposing no tax or a lesser tax upon those favoring the Democratic Party.

There is, we submit, no basic difference between the imposition of a discriminatory tax upon First Amendment expression and the discriminatory denial of tax benefits for the exercise of a First Amendment right.

Suppose in the *Hannegan* case the act of Congress unequivocally stated that second class mailing privileges should be granted only to newspapers and magazines espousing the Republican Party view on political affairs or that it should be denied to publications opposing low tariffs, recognition of Communist China or an increase in postal rates. Can there be any doubt that the statute would be unconstitutional? Or suppose the California statutes granted a tax exemption for contributions made to the Republican Party but not for those made to the Democratic Party. Could anyone seriously defend their constitutionality?

The tax exemption accorded to veterans under California law antedated the requirement of a non-advocacy

oath. The basis for the exemption was the fact that the beneficiary served in the armed forces. California might have granted that benefit in a different form, *e.g.*, a veterans' bonus. If, having done that, it had imposed a tax measured by the amount of the bonus upon all veterans who advocated the overthrow of the government, the constitutionality or unconstitutionality of that tax would not be determined by considerations different from those applicable if the statute conditioned the grant of the bonus upon non-advocacy. Similarly, in the present case, if a separate statute were enacted imposing a tax upon all veterans engaged in the proscribed advocacy and measuring that tax by the amount of exemption received under the previous statute, the constitutionality of the taxing statute, we submit, would have to be determined by considerations no different from those applicable in the present case where the exemption is conditioned upon non-advocacy.

B. Favored and Disfavored Expression

We submit that under the First Amendment only two classes of expression are recognized. The first is the general class of expression on matters of public interest which is not subject to direct governmental prohibition or restraint.[2] The second is the exceptional case where gov-

[2] In saying that there is a class of expression that cannot be restrained *directly* by the government, we refer to measures *designed* to achieve restraint. Undoubtedly, expression that lies within the constitutional guarantee may be restrained as an incidental and unavoidable result of achieving other social objectives. In such cases, the legislative body and the reviewing courts must consider both the importance of the objective to be achieved and whether the restraint is necessary to its achievement. We note below (1) that some restraints on political advocacy have been upheld on the theory that they were incidental and necessary to the achievement of other ends and (2) that no such claim is or can be made here.

ernmental prohibition is permissible, either because the expression is by its very nature harmful (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Roth* v. *United States*, 354 U. S. 476) or because the circumstances in which it is uttered present a clear, immediate and otherwise unavoidable danger to an overriding communal interest (*Schenck* v. *United States*, 249 U. S. 47). There is no room in a democracy for what may be called disfavored or neitherland expression, expression that is neither permissible nor impermissible, expression that the government does not and may not forbid but which it frowns upon and seeks to discourage.

That governmental power may not be used to discourage expression upon which public authorities look with disfavor is clear from *Murdock* v. *Pennsylvania*, *supra*. There the Court said at pp. 115-116):

> "Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative, abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. * * * But those considerations are no justification for the license tax which the ordinance imposes. *Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful.* If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights." (Italics supplied.)

The restraint thus condemned was an exercise of the taxing power, as it is in the instant case. If, as the *Mur-*

dock case holds, the government may not impose a tax upon expression whose dissemination it would discourage, it may not achieve the same end by withholding from the disseminator tax benefits granted to all others in the same class. The difference lies purely in the form of the discouragement, not in its substance. The premise applicable in both cases is the same—that within the realm of expression protected against abridgement by the First Amendment there is no second class citizenship; all legally permissible expression must be allowed to stand equally before the law.

We recognize, of course, that both the Federal government and the States are constitutionally empowered to encourage the production of certain products by the grant of subsidies and bonuses and to discourage the production of others by granting benefits only to producers who undertake not to produce the product or to produce it only in limited quantities. This is so because the government may well find that the general welfare would be promoted by increased production of certain products and curtailed production of others. Indeed, as the various conservation statutes attest, the government may curtail production without use of any incentives. *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422; *Geer* v. *Connecticut*, 161 U. S. 519.

The First Amendment rests on a directly contrary premise, the premise that the general welfare is promoted by uncurtailed expression on issues of public importance and, conversely, that the general welfare is prejudiced by curtailment of such expression.[3] Even expression advocating

[3] The only exception is the class of verbal blows, "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words —those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Roth* v. *United States*, 354 U. S. 476. These

the overthrow of the government may serve the general welfare. As Mr. Justice Frankfurter stated in his concurring opinion in *Dennis* v. *United States* (341 U. S. 494, 549):

> "* * * A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For * * * coupled with such advocacy is criticism of defects in our society. Criticism is the spur to reform; and Burke's admonition that a healthy society must reform in order to conserve has not lost its force. * * * It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellent the balance may be. * * *"

The reason government may in limited circumstances seek to prevent advocacy of overthrow by penalizing it is that the public welfare served by the "criticism of defects in our society" is overweighed by the overriding necessity to ward off a grave injury to the commonwealth. It is only in the rarest circumstances, however, that this necessity operates. Where it does not, the government may not penalize expression and, we submit, it is also prohibited from discouraging it by the half-way measure of purchasing a silence that may not be compelled.

The constitutional difference between expression on matters of public importance and the production of goods is well illustrated by a comparison of *Schneider* v. *Irvington*, 308 U. S. 147, and *Valentine* v. *Chrestensen*, 316 U. S. 52. In the former case the Court held that a municipality's interest in keeping its streets free of litter was not suffi-

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utterances may constitutionally be curtailed because they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Ibid.*)

ciently weighty to justify a ban on the street distribution of religious handbills. In the latter case it held that such an interest was sufficient to justify a ban on street distribution of commercial handbills. Here, too, we suggest that, while government may offer benefits to discourage the latter form of expression, it may not do so to discourage the former.

C. Rights and Privileges

In this context, any purported distinction between rights and privileges has no significance. Tax exemption may be a privilege rather than a right, but the appellants herein have a right not to be arbitrarily denied a privilege granted to all other veterans in the same class. The constitutional issue, therefore, is not whether the exemption is a right or a privilege, but whether the classification and resultant denial are arbitrary.

Far more important, to speak here of tax exemption as a privilege or a bounty is completely to disregard the social interest in the veteran's expression on matters of public interest. It implies that the transaction is exclusively a private one between the State and the veteran and that the latter's speech or silence may be the subject of barter and sale between them. Whether or not this would be constitutionally permissible in respect to matters relating exclusively to the affairs of the State of California, it is no more permissible in respect to matters affecting the Federal government than would be barter and sale of the veteran's right to vote in a Federal election, or a statute conditioning a veteran's tax exemption benefit on his voting only for Republican and Democratic candidates for Federal office.

II. Advocacy of overthrow may not constitutionally be prohibited in the absence of an incitement to concrete action.

If the principle proposed in this brief—that lawful expression may not be discouraged by the withholding of a benefit granted to others in the same class—is accepted by the Court, reversal of the decisions of the Supreme Court of California is required. *Yates* v. *United States*, 354 U. S. 298, held that a blanket prohibition of all advocacy is not within the penal scope of the Smith Act. While this decision was expressed in terms of statutory interpretation rather than constitutional law, the Court's opinion indicates quite clearly that the interpretation was necessitated by constitutional considerations. In holding that Congress did not outlaw advocacy as an abstract doctrine, the Court referred to the "constitutional danger zone" that would be involved were a contrary interpretation reached (354 U. S. at 319). Moreover, the Court relied upon a number of decisions that drew a sharp line between such advocacy and advocacy directed at promoting unlawful action (354 U. S. at 318). All the decisions cited by the Court—*Fox* v. *State of Washington*, 236 U. S. 273; *Schenck* v. *United States*, 249 U. S. 47 and *Gitlow* v. *New York*, 268 U. S. 652—were cases of constitutional law rather than statutory interpretation. Particularly significant is the Court's quotation (at pp. 318-319) of the following from the *Gitlow* case:

> "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. • • • It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of

> action for the accomplishment of that purpose. • • • This [Manifesto] • • • is [in] the language of direct incitement. • • • That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear. • • • That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear."

We respectfully urge that the Court now make explicit what was implicit in the *Yates* case: that mere advocacy of the overthrow of government by force or unlawful means "having no quality of incitement to any concrete action" cannot constitutionally be made criminal. If that premise is accepted—as we submit it must in view of the decisions cited and relied upon in the *Yates* case and the tenor of the Court's opinion—it follows that the advocacy involved in the present case cannot constitutionally be prohibited. The statute involved in the present case makes no distinctions between advocacy as an abstract doctrine and advocacy having the quality of incitement. It blankets all advocacy, including advocacy that cannot be made criminal.[4]

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[4] It is important to note that the majority opinion in the California Supreme Court placed reliance upon *Dennis* v. *United States*, 341 U. S. 494. (*First Unitarian Church* v. *County of Los Angeles*,—— Cal. 2d——, 311 P. 2d 508, 520-521). While one dissenting opinion laid considerable stress upon the difference between "a call to action" and "mere theoretical prophecy," and asserted that "it is unconstitutional to restrain plaintiff from advocating overthrow of the government" where the language is not "reasonably and ordinarily calculated to incite persons to such action" (*Id.* at pp. 524, 525), the majority opinion refused to recognize such a distinction and held that "the prohibited advocacy is penal in nature" and could constitutionally be made so (*Id.* at p. 521).

We recognize that this Court has upheld legislation having the effect of restraining advocacy of forceful overthrow without a showing of incitement to concrete action in such cases as *American Communications Association* v. *Douds*, 339 U. S. 382, *Adler* v. *Board of Education*, 342 U. S. 485 and *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716. The principle we urge, however, would not require reversal of these cases since the restraints were there upheld as incidental and unavoidable results of the attainment of other societal ends.[5] In none of these cases was it asserted that a benefit could be granted or withheld by government *for the purpose* of discouraging expression or association that was not and could not be made criminal. The most that can be said of these cases was that they held that a course of procedure adopted by government reasonably designed to effect an end within its constitutional competence was not rendered unconstitutional merely because an incidental consequence was to discourage certain expressions or associations.[6]

In *American Communications Association* v. *Douds*, *supra*, the Court upheld the "non-Communist" oath provision of the Labor Management Relations Act because it held that Congress could reasonably find that Communists are likely to foment political strikes and political strikes constitute obstructions to the free flow of commerce, the

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[5] We express no opinion on whether these cases should not be reexamined and reconsidered. We suggest only that adoption of the principle urged in this brief does not require such reexamination and reconsideration.

[6] *Cf. People ex rel. Everson* v. *Board of Education*, 330 U. S. 1, where it was held that a state program to protect children from traffic hazards by financing their transportation to schools was not rendered unconstitutional merely because an incidental consequence was that parochial schools were benefited.

removal of which is a proper governmental function. The Court, in relying on *United Public Workers* v. *Mitchell*, 330 U. S. 75, expressly stated that the decision in that case "was not put upon the ground that government employment is a privilege to be conferred or withheld at will" (at p. 405). The basis for the decision was that the incidental restriction on freedom of speech and association resulting from the use of reasonable means to achieve an objective within the competence of Congress did not invalidate the statute.

United Public Workers v. *Mitchell, supra*, and *Oklahoma* v. *United States Civil Service Commission*, 330 U. S. 127, obviously did not present cases of the withholding of a benefit in order to discourage conduct which the government generally looked on with disfavor, for the benefit (employment by the Federal government or payment of State employees' salaries partly out of Federal funds) was conditioned upon the recipients' withdrawal from conventional and accepted political activities. The purpose of the statute in both cases was the legitimate one of securing a civil service free of partisan politics. The fact that as an incidental by-product, engagement in politics would be discouraged on the part of some who preferred to work in civil service was held insufficient to invalidate the statute.

Garner v. *Board of Public Works* and *Adler* v. *Board of Education, supra*, held simply that "a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability." 341 U. S. at 720, 342 U. S. at 492. In passing upon the qualifications of employees and prospective employees, Federal, State and municipal officials obviously must have a wide area of discretion. Whether or not the *Garner* and *Adler* cases

were correctly decided, and whether or not they should now be reconsidered in these calmer times, it remains true that they held no more than that the incidental discouragement of certain expression and association as a by-product of the government's fixing the qualifications of its employees does not deprive government of the power reasonably to fix such qualifications. The purpose was not to deter expression but to ensure efficient government service.

Here, the sole purpose is to deter. We are not involved with government employees or would-be employees or with labor union representatives whose activities affect the free flow of commerce. We are concerned with those who do or do not engage in a particular form of advocacy. The sole purpose of the State's action is to discourage that advocacy. No more than this is claimed by the court below. It upheld the amendment and statute on the ground that the State could defend itself against advocacy of violent overthrow "by placing in a favored economic position * * * those particular persons and groups of individuals who are capable of formulating policies relating to good morals and respect for the law" (311 P. 2d at 520). The only other State interest mentioned by the court is that of protecting the State revenues against "impairment" or "exploitation" by those who would use unlawful means to destroy the State (*Id.* at 513-14, 519). But this is merely another way of saying the same thing, that the State intends to deny to those who engage in the disfavored expression a benefit that others may have. The amendment and statute simply determine whether veterans shall pay a greater or lesser tax. This is purely a matter of money, exactly as a fine for committing a prohibited act involves purely a matter of money.

In short, all that is involved here is the depriving of a person of a sum of money as a consequence of (realistically, as a punishment for) his engaging in conduct which the State desires to deter. The State's action here is a direct restraint on expression and has no other purpose. As such, it can be justified only if the expression is of a kind that the State may constitutionally suppress. We respectfully submit that, under the doctrine of the *Dennis* and *Yates* cases, *supra*, the expression here sought to be curbed is not in that category. The restraint is therefore unconstitutional.

Conclusion

The California statute under examination here represents a dangerous experiment in American liberties. It seeks to establish a new class of expression—expression that is not prohibited and yet not permitted. It seeks to use the taxing power not for the legitimate purpose of raising revenue but to discourage expression which the First Amendment does not allow government to prohibit. The majestic purpose of the First Amendment cannot be so easily frustrated.

Respectfully submitted,

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